

Dawson Construction Company, Inc. and Christopher Dean Warden. Case 17-CA-17394

December 18, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND TRUESDALE

Upon a charge and amended charge filed May 19 and June 21, 1994, by Christopher Dean Warden (Warden or the Charging Party), the Regional Director for Region 17 issued a complaint against Dawson Construction Company, Inc. (the Respondent), alleging that the Respondent engaged in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the National Labor Relations Act. Copies of the complaint and notice of hearing were served on the Respondent and the Charging Party. The Respondent filed a timely answer denying the commission of any unfair labor practices.

On December 22, 1994, on the basis of an all-party stipulation, the parties filed with the Board a petition to transfer the instant proceeding to the Board without a hearing before an administrative law judge and submitted a proposed record consisting of the formal papers and parties' stipulation of facts with attached exhibits. On January 27, 1995, the Acting Executive Secretary of the Board issued an order granting the petition, approving the stipulation, and transferring the proceeding to the Board. Thereafter, the General Counsel and the Respondent filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the stipulation, the briefs, and the entire record of this proceeding, and makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Alabama corporation with an office and place of business in Fort Leavenworth, Kansas, is a general contractor engaged in the construction industry. The Respondent annually purchases and receives at its Fort Leavenworth jobsite and other jobsites located in the State of Kansas goods valued in excess of \$50,000 directly from points outside the State of Kansas. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that International Union of Elevator Constructors (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The issue is whether the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Warden, who is an employee of the Respondent, because he refused to hold a reserve gate sign at the Fort Leavenworth jobsite where employees of a subcontractor had established a lawful primary picket line.

A. Facts

The Respondent is a general contractor at the Fort Leavenworth jobsite. Mid-States Elevator is a subcontractor at that jobsite. Since April 20, 1994, Mid-States' employees, whom the Union represents, have been on strike and have maintained a lawful primary picket line at the Fort Leavenworth jobsite. The Respondent's employees are not represented by the Union or any other labor organization.

On April 21, 1994, the Respondent directed Warden to come to work the next day and hold a sign establishing a reserve gate for the Respondent's employees. The owner of the Fort Leavenworth jobsite would not grant the Respondent permission to place the reserve gate sign in the ground or post the sign on a fence.

On April 21, 1994, Warden told the Respondent that he did not want to hold the sign because he did not want to become involved in the labor dispute between Mid-States and the Union and because he had friends who were employees of Mid-States who were engaged in the strike. That day the Respondent discharged Warden for refusing to hold the sign.

B. The Parties' Contentions

The General Counsel contends that Warden has a Section 7 right to refuse to engage in activity that entmeshes him in a labor dispute and the Respondent's demand that Warden hold a reserve gate sign impinges on that Section 7 right. The Respondent contends that the Board will be interfering with the Respondent's right to create and maintain a reserve gate, if it finds a violation for discharging Warden.

C. Analysis

For the following reasons, we find that Warden's refusal to hold the reserve gate sign is protected by Section 7, and therefore the Respondent violated the Act when it discharged him.¹

¹ In addition, Member Browning observes that, according to the stipulation, there was a lawful primary picket line at the jobsite "[a]t all material times"; the stipulation indicates that Warden refused to perform the only task the Respondent assigned him; and the parties' stipulation did not suggest that there was already a reserve gate established on the day the Respondent discharged Warden. She would conclude, from these facts and from the absence of any factual stipulation otherwise, that Warden withheld his services by refusing to cross a lawful picket line and therefore the Respondent violated Sec. 8(a)(1) by discharging him for doing so. See *Cooper Thermometer Co.*, 154 NLRB 502 (1965).

We believe that these are the critical facts. At the Fort Leavenworth jobsite, because of a labor dispute with Mid-States, employees of Mid-States represented by the Union established a primary picket line. In response to that picket line, the Respondent ordered Warden to hold a sign at an entrance to the jobsite declaring that entrance reserved for the Respondent's employees. When Warden refused, because he did not want to become involved in the labor dispute between Mid-States and its employees, the Respondent fired him.

At a construction jobsite where there is a labor dispute between an employer and its employees, a neutral employer may avoid becoming enmeshed in picketing related to the dispute. To do so, the neutral employer may establish a gate reserved for the exclusive use of its employees. *Building & Construction Trades Council (Markwell & Hartz)*, 155 NLRB 319 (1965), enf'd. 387 F.2d 79 (5th Cir. 1967), cert. denied 391 U.S. 914 (1968). A reserve gate sign makes clear that the entrance is not for the use of employees of the employer with whom there is a labor dispute. Thus, the reserve gate sign is the means by which the neutral employer makes known that it is not involved in the labor dispute.

The Respondent's right not to become enmeshed in the Mid-States labor dispute is clear and is not at issue in this case. That, however, does not end the matter. By establishing the reserve gate disassociating itself from the labor dispute, the Respondent unavoidably makes a statement about the labor dispute. An employee holding the reserve gate sign is participating in making that statement.

We have held that an employer may not require employees to disseminate antiunion literature. *Scientific Atlanta*, 278 NLRB 467 (1986). We have also held that an employer may not distribute campaign materials in a way that effectively forces employees to accept or reject the proffer, thereby "pressuring employees to make an observable choice or open acknowledgment of their union sympathies." E.g., *A. O. Smith Automotive Products Co.*, 315 NLRB 994 (1994). The principle at work is the Section 7 right to engage in protected concerted activity or to refrain from such activity. In other words, the right to engage in union organizing or not is a protected right with which an employer cannot interfere by compelling an employee to participate in the dispute.

The Fifth Circuit has described this protection as "the right to express an opinion or to remain silent." *Texaco, Inc. v. NLRB*, 700 F.2d 1039, 1043 (5th Cir. 1983). We believe that principle is applicable to this case. An employee who complies with an order to hold a reserve gate sign becomes a visible instrument in the implementation of the employer's decision to establish a reserve gate, thereby participating in the employer's

statement about the labor dispute. Because a properly established reserve gate system ordinarily has the effect of "forc[ing] the union to picket only the [gate reserved for employees of the employer with whom there is a labor dispute]," *Electrical Workers IBEW Local 501 v. NLRB*, 756 F.2d 888, 894 (D.C. Cir. 1985), an employee's holding a reserve gate sign could be viewed by others as being indicative of the position he is taking with respect to the strike.² Just as an employee's right to refrain from expressing an opinion about union organizing cannot be compromised by forcing him to disseminate, accept, or reject antiunion literature, we believe the right to remain silent includes the right not to be compelled to participate publicly in making the Respondent's statement about the Mid-States labor dispute.

The dissent acknowledges that the Respondent required Warden to hold a sign that makes a statement "about" the strike. Contrary to our dissenting colleague's assertion, Warden's refusal to hold a sign "about" the strike falls well within the protections afforded by Section 7 of the Act. As the court recognized in *Texaco*, supra, the Act broadly protects "union-related speech" and "union-related silence." 700 F.2d at 1043. Here, as the dissent virtually concedes, the reserve gate sign makes a statement "related" to the Union's strike against Mid-States. Therefore, Section 7 grants Warden the right not to make that statement, regardless of whether the statement addresses what some might term the "merits" of the strike. Indeed, it is our experience that employees frequently wish to disassociate themselves entirely from a labor-management dispute and, in effect, express no view on "the merits." Section 7 protects their right to do so, and we find no basis in the Act or its policies for narrowing its protections in the manner advocated by our dissenting colleague.

In sum, when the Respondent ordered Warden to hold the reserve gate sign, it was requiring him to participate in making the Respondent's statement about the Mid-States labor dispute. When Warden refused, he was exercising his right to remain silent about the dispute. We conclude that an employer's right to establish a reserve gate does not extend so far as to permit overriding an employee's Section 7 right to remain silent by requiring him to participate in establishing that gate by holding the reserve gate sign.

Accordingly, when the Respondent discharged Warden because he refused to hold the reserve gate sign, it violated Section 8(a)(3) and (1).

²Even accepting that the sign simply indicates neutrality, that is a position which is being involuntarily imposed on the employee. An employee cannot be forced to make a statement indicating neutrality any more than he or she can be forced to make a statement either in support of or opposition to a union.

CONCLUSION OF LAW

By discharging Warden because he refused to hold a reserve gate sign, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we shall order the Respondent to offer Warden immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to expunge from its files any and all references to the unlawful discharge, and to notify the discriminatee in writing that this has been done.

ORDER

The National Labor Relations Board orders that the Respondent, Dawson Construction Company, Inc., Fort Leavenworth, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they refuse to hold a reserve gate sign.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Christopher Dean Warden full and immediate reinstatement to his job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to agents of the Board for examination and copying, the payroll records, social security records, timecards, personnel records, and all of the other records necessary

to analyze the amounts due under the terms of this Order.

(d) Post at its facility in Fort Leavenworth, Kansas, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER TRUESDALE, dissenting.

Unlike my colleagues, I would not find that the Respondent acted unlawfully by discharging Warden because he refused to hold a reserved gate sign. The sign read:

**FRONT GATE
NOTICE TO SUBCONTRACTORS, SUPPLIERS
AND EMPLOYEES OF DAWSON
CONSTRUCTION CO., INC.**

THIS ENTRANCE IS RESERVED FOR THE SOLE
AND EXCLUSIVE USE OF EMPLOYEES,
SUPPLIERS AND BUSINESS VISITORS OF
**DAWSON CONSTRUCTION CO., INC., AND ALL
SUBCONTRACTORS AND SUPPLIERS TO
DAWSON CONSTRUCTION CO., INC. WITH
THE EXCEPTION OF MID STATES ELEVATOR
COMPANY.**

EMPLOYEES, SUPPLIERS AND BUSINESS
VISITORS OF **MID STATES ELEVATOR
COMPANY** ARE REQUIRED TO USE THE **BACK
GATE ONLY.**

THESE RESTRICTIONS ARE STRICTLY
ENFORCED.

Although the language appearing on the sign does not specifically mention the Union's labor dispute with Mid-States Elevator Company, I agree with my colleagues that, at least to one familiar with labor relations issues, the sign does make a statement about the strike. That statement, however, does not concern the merits of the strike. Quite the reverse: it says that the Respondent, Dawson Construction, is neutral with respect to the strike—it is not involved on either side in any way. As my colleagues recognize, it is that neutrality that allows the Respondent to maintain a re-

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

served gate for its employees, suppliers, and business visitors that will not be subject to the Union's picketing of Mid-States. By instructing Warden to hold the sign establishing the reserved gate, the Respondent was directing him to convey only the message of its own neutrality. That message cannot, in my view, reasonably be read as implying anything about Warden's position (assuming he had one) with regard to the strike. Had Warden carried the sign, the only statement he would have made by that action would have been, "My employer is not involved in the labor dispute between Mid-States and the Union."

I also disagree with Member Browning's conclusion that Warden's position amounted to a refusal to work at all or to cross the Union's picket line. I do not believe the record supports her position. As Member Browning observes, the parties have stipulated that there was a lawful primary picket line at the jobsite "at all material times, since April 20, 1994." Warden alleged in his original charge that he was working overtime on April 21, 1994, "the day after the strike," when he was asked to come in an hour early the next day and "hold the Mid-State sign." He further stated that "I told [the supervisor] that I really didn't want to do it[.]" It thus appears, from Warden's own statements, that he continued to work (presumably at the picketed jobsite) after the strike had begun and that the only task he refused to perform was that of holding the reserved gate sign. On this record, I do not find (and the complaint does not allege) that Warden was withholding his services in solidarity with the Union or that he was fired for refusing to cross the picket line.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge our employees because they refuse to hold a reserve gate sign.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Christopher Dean Warden full and immediate reinstatement to his job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL remove from our files any reference to Warden's unlawful discharge and WE WILL notify him in writing that this has been done and that the discharge will not be used against him in any way.

DAWSON CONSTRUCTION COMPANY,
INC.